82-1265

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

GERARDO GARCIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

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QUESTION PRESENTED

Whether a search warrant affidavit which contains a deliberate falsity by the affiant as well as hearsay statements from an informer, must be entirely quashed, rather than excised of the falsity and then tested for probable cause.

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Petitioner, People of the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court, First Judicial District, entered on September 8, 1982.

OPINION BELOW

The opinion of the Illinois Appellate Court is reported at 109 Ill. App. 3d 142, 440 N.E.2d 269 (1st Dist. 1982), and appears herein as Appendix A. The order of the Illinois Supreme Court on November 30, 1982, denying petitioner's petition for leave to appeal is reported at 92 Ill. 2d (24) and appears herein as Appendix B.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on September 8, 1982. A timely petition for leave to appeal was denied by the Illinois Supreme Court on November 30, 1982. That order appears herein as Appendix B. This petition was filed within 60 days from that date. This court's jurisdiction is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL PROVISION AT ISSUE

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Warrant

An informant told Chicago Police Officer Joseph Carone that on October 10, 1979, he witnessed respondent sell $9,000 worth of cocaine to an anonymous source. (Supp. R. 4-5) On October 11, 1979, Officer Carone swore out an affidavit which was used as the basis for a search warrant. (Supp. R. 4) The affidavit stated that an informant had told Officer Carone that respondent made the illegal sale of cocaine. The affidavit also stated that an "independent investigation" revealed that on October 10, 1979, the premises at 5874 Ridge were as the informant stated they were, and that a 1978 white Cadillac bearing Florida license plates and owned by respondent was parked in front. (Supp. R. 5) It is assumed that Officer Carone, the affiant, conducted the independent investigation.

Motion To Quash

Respondent filed a written motion to quash the search warrant and suppress the evidence seized. (R. C38) Respondent supplemented the motion with his affidavit which challenged each allegation made by Officer Carone in the search warrant affidavit. (R. C53-54) Respondent also challenged the integrity of Officer Carone's oath as to the entire search warrant affidavit. Respondent specifically stated that his car could not have been observed parked in front of his home on October 10, 1979 because he was in Murfreesboro, Tennessee on that date. Appended to respondent's affidavit was a copy of a telephone bill indicating that a call had been made from Murfreesboro, Tennessee at

12:20 p.m. on October 10, 1979, to the telephone number of respondent's Miami, Florida residence. Respondent further stated in his affidavit that he left Miami on October 10, stopped in Murfreesboro to make the telephone call, and arrived in Chicago in the early morning hours of October 11. (R. C53-54)

At the hearing conducted on respondent's motion to quash the search warrant and suppress the evidence seized, respondent contended that in light of his affidavit and telephone bill, he had made a substantial preliminary showing to justify cross-examining Officer Carone, the search warrant affiant. (R. 59) The prosecutor objected and argued first that respondent did not make a substantial preliminary showing. The prosecutor also argued that even if the part of Officer Carone's affidavit pertaining to seeing respondent's car were excised, the remaining contents of the affidavits would establish probable cause. (R. 64-67)

Rulings

After hearing arguments from respondent and the People, and reading the search warrant affidavit and respondent's affidavit, the trial court denied respondent's motion to quash the search warrant. (R. 70)

A jury found respondent guilty of possession of a controlled substance containing more than 30 grams of cocaine and of possession with intent to deliver the same. (R. C3)

The Illinois Appellate Court found that respondent had made a substantial preliminary showing that the search warrant contained a deliberate falsity and so reversed respondent's conviction and, pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667

(1978), remanded for an evidentiary hearing on the motion to quash the arrest and suppress the evidence seized. The Appellate Court held that if a search warrant contained any deliberately false statement, then the integrity of the affiant's oath would be impugned and the entire affidavit would have to be voided. (See Appendix p. 6a) Therefore, if the affidavit contained hearsay statements from an informant, the affidavit could not be trusted to accurately communicate the informant's statement and so the informant would have to be produced in order for the court to ascertain the actual content of his statement. (See Appendix p. 11a)

The petitioner's subsequent petition for leave to appeal was denied by the Illinois Supreme Court.

REASON FOR GRANTING THE WRIT

THE ILLINOIS APPELLATE COURT DISTORTED THE CLEAR MEANING OF *FRANKS V. DELAWARE* BY ERRONEOUSLY HOLDING THAT IF A SEARCH WARRANT AFFIDAVIT CONTAINS A DELIBERATE FALSITY BY THE AFFIANT, THEN THE ENTIRE AFFIDAVIT MUST BE QUASHED, RATHER THAN REQUIRING ONLY THE EXCISION OF THE FALSE INFORMATION AND TESTING THE REMAINING PORTION FOR PROBABLE CAUSE ON THE BASIS OF INFORMATION PROVIDED BY A RELIABLE UNIDENTIFIED INFORMER.

In the course of investigating allegations that respondent had sold $9,000 worth of cocaine to an anonymous source, Police Officer Carone swore out a search warrant affidavit. The affidavit contained a statement from an informant that respondent had made the sale of cocaine on October 10, 1979. The affidavit also stated that an "independent investigation" established that on October 10, 1979, respondent's car was parked in front of his home. It is assumed that Officer Carone, the affiant, conducted the independent investigation.

Prior to trial, respondent moved to quash the search warrant and suppress the evidence as seized in violation his Fourth Amendment rights. Respondent challenged each allegation made in Officer Carone's affidavit as well as the veracity of the oath taken by the officer. The trial court denied respondent's motion and he was subsequently convicted of both possession of cocaine and possession with intent to deliver cocaine.

On appeal from the conviction, the Illinois Appellate Court reversed and, pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), remanded for an evidentiary hearing on respondent's motion to suppress the evidence and quash the arrest.

The Appellate Court held that respondent had made a substantial preliminary showing that the search warrant contained a deliberate falsity.* The Appellate Court erroneously held that if a search warrant affidavit contained any deliberately false statement then the entire affidavit would have to be voided. The Appellate Court then reasoned that if the affidavit contained hearsay statements from an informant, the informant would have to be produced in order to ascertain the content of his actual statement. Petitioner respectfully suggests that the holding of the Illinois Appellate Court from which the writ of certiorari herein is sought is not only contrary to the purpose and intent of the Fourth Amendment and *Franks*, but it also undermines this Court's decisions which have credited hearsay averments from informants in search warrant affidavits. See *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *McCray v. Illinois*, 386 U.S. 309, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967).

First, the Illinois Appellate Court opinion is in direct conflict with this Court's opinion in *Franks*. *Franks* held that any portions of the warrant affidavit which had been proven false could be excised, leaving the remainder of the affidavit intact. The Appellate Court has gone well beyond this rule by holding that if part of the affidavit has been proven false, then the veracity of the oath of the affiant has been impugned and the entire affidavit must be voided. Thus, the Appellate Court has erroneously replaced the *Franks* excision rule with its own voidance rule. Petitioner submits that the Appellate Court is attempting to create Fourth Amendment

* The *Franks* hearing has not yet been held and petitioner does not concede that the affidavit contains a deliberate falsity.

rights where neither the Amendment nor this Court have envisioned those rights. The rule under *Franks*, excision of the false statements, provides ample protection for a criminal defendant's Fourth Amendment rights.

Moreover, the repercussion of the Appellate Court's decision strikes at the very heart of law enforcement. The Appellate Court held that if, at the *Franks* hearing, the judge doubts the credibility of the affiant police officer, the judge may require that the informer be identified or even produced. (See Appendix p. 11a) Yet this Court has held that a search warrant affidavit may be based upon hearsay from an informant, *McCray v. Illinois*, provided that the affiant includes in the affidavit underlying circumstances from which the affiant concludes the informer is credible and reliable. *Aguilar v. Texas*. The policy reason behind these opinions is compelling. Informants simply will not appear in court and, if they did, their value as informants would be reduced to zero. The informant's identity would be revealed, his contacts exposed and therefore, his ability to function as a police informant would be destroyed. The decision of the Appellate Court has therefore dealt a lethal blow to law enforcement.

Furthermore, the question of excision versus voidance is not confined to only the instant Appellate Court opinion. Under similar factual circumstances, the court in *People v. Hothersall*, 103 Ill. App. 3d 183, 430 N.E.2d 1142 (2d Dist. 1981) held in favor of excision while in *People v. Farnsworth*, 95 Ill. App. 3d 105, 419 N.E.2d 693 (3d Dist. 1981), the court quashed the entire search warrant affidavit. Other states are also struggling with this question. The New Jersey Supreme Court held that the deliberately false statement could merely be excised,

State v. Howery, 80 N.J. 563, 404 A.2d 632 (1979), yet in California, the supreme court held that a deliberately false statement would serve to quash the entire affidavit. *People v. Cook*, 148 Cal. Rptr. 605, 583 P.2d 130 (1978).

In summary, petitioner submits that the Illinois Appellate Court distorted this Court's decision in *Franks* by holding that a search warrant affidavit must be totally voided if it is established that the affiant made a deliberate falsity. *Franks* held only that the falsity should be excised and that the rest of the affidavit was to remain intact. The devastating repercussion of the Appellate Court's erroneous decision is that in Illinois, hearsay statements by informants no longer need be credited and therefore, trial judges may order the production of the informant. The Appellate Court made this decision without regard for the fact that an informant who has been identified in court will never again be able to function as an informant. Therefore, since the Appellate Court distorted this Court's decision in *Franks*, certiorari should be granted so that the question of excision versus voidance of a search warrant affidavit containing a deliberate falsity may be clarified and explained.

CONCLUSION

For the foregoing stated reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Illinois Appellate Court, First Judicial District, First Division.

Respectfully submitted,

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